arbitration as to the line of march may be proved *prout de jure.*

This was an action of declarator as to the marches of two conterminous properties in the burgh of Sanquhar. The pursuers alleged that, in order to settle disputes, a verbal reference was made in August 1861, between Mr Macqueen, writer, Sanquhar, acting, or professing to act, for the pursuers, and the defender Weir, to two inhabitants of Sanquhar named William Russell and Robert Campbell, to lay down the exact boundary line, with the view merely to regulate the possession of the tenants. These referees met the parties on the ground, and marked off the line of fence between the respective back-yards. This line corresponds with that described in the conclusion of the summons.

After a proof, the Lord Ordinary (GIFFORD) gave decree, and added a note to his interlocutor, which contained the following passages:—"It was pleaded by the defender that the boundary being fixed under a verbal arbitration in 1861, followed by the erection of a wooden paling and a certain acquiescence, the present action is excluded. This defence required evidence, and proof thereof was included in the general proof allowed to the parties. On considering the proof, the Lord Ordinary has no hesitation in repelling the plea. His grounds shortly are—(1) A verbal reference regarding heritage, or the boundaries of heritage, and a verbal award thereon, are not binding on either party. (2) The authority to refer is not proved. The reference, such as it was, was gone into by the pursuers' agent, who stated that he did not tell any of his clients thereof till long after. (3) The same witness seems to prove that the reference was merely to fix a temporary fence, not the ultimate right of property. (4) The erection of the paling, which merely cost 24s., cannot be founded on as *rei interventus* establishing an heritable right. (5) There was no acquiescence; for as soon as the position of the paling came to the knowledge of the pursuers and their agent, they objected, and disputes ensued. (6) It is a matter of controversy whether the paling was really erected on the line fixed by the arbiters. There is evidence to show that the arbiters intended to fix the boundary as in a straight line with the west wall of Janet Currie's house—that is, the line contended for by the pursuers. There is no alternative, therefore, but to determine the real boundary according to the evidence. The title-deeds of the respective parties do not fix the boundary line. Each property is described as bounded by that of the other or neighbouring proprietor, leaving the marches to be fixed by immemorial possession. Now, upon the whole evidence, and taking into view the position and circumstances of the respective properties, the Lord Ordinary is of opinion that the line contended for by the pursuers is, as nearly as can be ascertained, the true boundary line between the properties of the pursuers and defender respectively."

The defender reclaimed.

NEVAY for him.

PATTISON for the respondents.

At advising—

The LORD JUSTICE-CLERK—If I had concurred with the grounds of the Lord Ordinary's judgment, I should have simply expressed my adherence, as, in a case like the present, the Lord Ordinary acts as a jury. I propose to concur in the result at which he has arrived, but, as matter of law of some importance has been raised, I will shortly state my opinion.

The point in which I differ from the Lord Ordinary is, that he finds the verbal arbitration invalid. This arbitration was, I think, the only sensible thing done by the parties in the case. Lord Cowan has put into my hand a passage from Mr Montgomery Bell's book on Arbitration, p. 53, in which he says—"Where parties have had a dispute respecting the marches of their adjoining lands, and have submitted the dispute to arbitration, parole proof has been repeatedly allowed, both of the submission and also of the award, the latter having been made in a practical and patent form, by the arbiters causing march stones to be set at their own sight in their determinate places in the boundary line. Gilmour states the doctrine of his day in these terms—'Differences about marches may be submitted and determined verbally; both submission and sentence may be proved *prout de jure.*'" That being, as I think, the satisfactory and sound principle, I cannot concur with the Lord Ordinary in thinking the arbitration is not binding.

It is said that Mr Macqueen had no authority to bind his clients. There is a strong presumption that he had authority. At all events, the parties paid one-half of the expense of the fence which was put up, and they paid Mr Macqueen's account, which contained charges with reference to the arbitration. I do not think they could repudiate this after seven years.

But it is said that the fence was not put up in accordance with the findings of the arbiters. I do not think that anything can bar the pursuers proving that. And I think that it has been proved.

The other judges concurred, and the Court adhered.

Agent for Pursuers—James Somerville, S.S.C.

Agent for Defender—Robert Finlay, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

LAMOND'S TRUSTEES *v.* CROOM.

Trustee—Creditor—Preference—Liability—Co-Trustee—Agent and Principal. Testamentary trustees, who had *bona fide* made payments to beneficiaries and to postponed creditors out of the trust-estate, which unexpectedly proved insolvent, *held* personally liable to an unpaid preferable creditor to the extent of the funds thus paid away.

Trustees who employed one of their number to act for them in a foreign country, *held* liable for acts done by him within the general scope of his authority.

The late Mr Malcolm Lamond, a native of Scotland, died in November 1864 at Shanghai, where he had carried on business for some years. He left a trust-settlement executed in Scotland during a visit in 1863. Mr Thomas Smith, one of the trustees and executors named in the settlement, was at the time of Mr Lamond's death resident at Shanghai; the other trustees were all resident in Scotland. Mr Lamond was possessed of personal property both in China and in Scotland; he was also the proprietor of certain real subjects at Shanghai, over which he had granted a mortgage for 10,000 taels (a tael being about 6s. 8d.) in favour of Mr A. F. Croom. For the purpose of realising

Mr Lamond's estate in China, a power of attorney in very ample terms was sent out to Mr Smith by his co-trustees, empowering him to complete any title that might be necessary either in his own name or that of the general body, to ingather the effects, and pay the debts due in China, and generally to exercise all rights in that country competent to the trustees. Mr Smith admittedly was aware of the existence of a mortgage over the real estate, though he was ignorant of the creditor's name. The value of the subjects at the time of Mr Lamond's death was estimated to be amply sufficient to cover the debt. Acting *bona fide* on this belief, Mr Smith paid the ordinary unsecured creditors in full out of the personal estate, and remitted the balance to the trustees in Scotland. No notice of his mortgage was given by Mr Croom either to Mr Smith or to the other trustees till October 1865, by which time the other debts had been paid in full. Meanwhile property in Shanghai rapidly deteriorated in value, and when in February 1866 Mr Croom sold the subjects in virtue of his mortgage, there was a deficiency of above £2000. The trustees in Scotland had previously made certain payments, amounting to about £55, to beneficiaries under the trust. The total balance in their hands, including the funds remitted by Mr Smith, amounted to about £471. Mr Croom now raised a multiplepoinding in name of the trustees, in which as sole claimant he was ranked for the balance of his debt. The present questions between the parties arose in the shape of objections to the statement of the fund *in medio*. Mr Croom objected to the trustees taking credit for the sums which had been paid to ordinary contract creditors in China, on the ground that by the law of England, which regulated the administration of Mr Lamond's estate at Shanghai, he as a "specialty creditor" was entitled to a preference over the personal estate of the deceased for any balance not covered by his security. He accordingly claimed that the sums thus paid away, amounting with interest to £986, 10s. 2d., should be replaced by the trustees in the fund *in medio*. In the second place, he objected to the payments made to beneficiaries. He also objected to certain charges for management, &c., by Mr Smith. A remit having been made to an accountant, the latter struck off certain items of charge, and brought out the balance in the hands of the trustees to be £539, 16s. 4½d., subject to the objections in point of law by Mr Croom.

The Lord Ordinary (GIFFORD) was of opinion that the determination of the first objection depended on the law of England, and ordered a case to be adjusted for the opinion of English counsel. A case was accordingly framed, in which counsel was requested to answer the following queries:—"1st, By the law of England, has the mortgagee a right of preference in virtue of the mortgage-deed above mentioned against the simple contract creditors of Mr Lamond, over the personal estate or assets left by him in China? 2d, Were the trustees, or Mr Smith as their factor, entitled in the circumstances above stated, to pay the truster's debts at Shanghai, or were they bound to retain the whole trust funds to meet the mortgage debt, or any deficiency which might arise thereon?"

The following opinion was returned by GEORGE MELLISH, Esq., Q.C.:—1st, "I am of opinion that, by the law of England the mortgagee in this case, being a creditor by specialty, had a right of preference, in virtue of the mortgage-deed, over the simple contract creditors of Mr Lamond, in the administration of the personal estate and assets left by him in China. 2d, I am of opinion that the trustees, and Mr Smith as their factor, had, under the circumstances, notice of the specialty debt at the time they paid the simple contract debts, notwithstanding they did not know the name of the specialty creditor, and he had given them no express notice of his debt; and having notice of the specialty debt, they, by paying the simple contract debts in priority to the specialty debt, made themselves, to the extent of the assets so misapplied, personally liable to the specialty creditor in case it ultimately turned out that there was a deficiency of assests, and the specialty creditor could not get paid."

The Lord Ordinary (MACKENZIE), before whom the case came to depend, found that the trustees, and Mr Smith as their factor, "had, under the circumstances, notice of the said specialty debt at the time the said simple contract debts were paid in priority to the said specialty debt, and made themselves, to the extent of the assets misapplied in such payment, personally liable to the said Alexander Frederick Croom, the specialty creditor, whose debt remains unpaid to a much larger extent than the amount of said assets; therefore finds that the payment of the said simple contract debts, with the interest thereon, amounting to £986, 10s. 2d., as appearing in the accountant's report, is not to be allowed as an item of discharge for the nominal raisers, and that the fund *in medio* falls to be enlarged accordingly."

Mr Lamond's trustees reclaimed.

STRACHAN for Mr Smith.

MILLAR, Q.C., and WATSON, for the other trustees.

SOLICITOR-GENERAL and MACLEAN for Mr Croom.

For the trustees it was argued that the payment of the ordinary creditors was not an act of maladministration on the part of Mr Smith, Mr Croom having given no notice of his claim, although he had an agent resident at Shanghai; and secondly, that, in any view, the other trustees were not liable, inasmuch as the employment of an agent was necessary under the circumstances, the selection of their co-trustee, Mr Smith, was a prudent one, and no reasonable precaution was omitted by them, and that consequently their liability was only to the extent of the funds realised and remitted to them by Mr Smith.

At advising—

LORD PRESIDENT—The nominal raisers of this multiplepoinding are the trustees of the late Mr Lamond, who spent many years in China, and left means both there and in Scotland. The real raiser is an unpaid creditor of the deceased. The state of funds, as condescended on by the trustees, and corrected by the accountant, is shortly this:—The balance in their hands on the 14th August 1867 was £471, 17s. 4d., but which must be increased by certain charges struck off by the accountant to £537, 16s. 4d. To this state Mr Croom objects on two grounds—(1) to the payments made to ordinary creditors in China; and (2) to payments made to beneficiaries in this country. About the second objection there can be no doubt. The estate is insolvent, and executors who make any payments to beneficiaries before they have paid off the whole debts, do so entirely at their own risk. The trustees are bound to replace in the fund *in medio* the sum thus improperly paid away. In regard to the first objection, Mr Croom's posi-

tion is this. He had a debt secured over certain real property in Shanghai, which turned out insufficient to pay his full debt. According to the law of England, which prevailed at Shanghai, he was not only entitled, like a heritable creditor, to rank for his unsecured balance, but he was preferable for that balance, on the ground of his being what is called in English law a "specialty creditor." Mr Smith, acting on behalf of the trustees, seems to have disregarded Croom's debt altogether. He chose to assume that the mortgage was sufficient to provide for payment of the debt in full, and on that assumption he paid the ordinary unsecured creditors in Shanghai, and remitted the balance to the trustees in this country. An executor who pays postponed creditors and leaves a preferable creditor unpaid, does this at his own risk, just as if he had paid beneficiaries before creditors. Mr Smith was aware of the existence of the "specialty debt," and chose to take his risk, and has thus landed himself in liability to the unpaid creditor. The question then arises, whether the other trustees are involved in this liability, and therefore whether they are bound to replace in the fund *in medio* the sum thus improperly paid away by Smith. This depends upon the relation between them and him. He was furnished with a power of attorney from them in the amplest terms —in fact, he was employed to act for them just as if they had been present in Shanghai. The question rather belongs to the law of principal and agent, how far the trustees are liable for the acts of Smith on their behalf? If Smith had committed a fraud, it would be a question of delicacy how far they are answerable for it. But we have no case of fraud here. Smith was acting in accordance with his powers, and his error was one in judgment. For any such act, done within the general scope of his authority, his principals are answerable. They are as much bound to replace to Mr Croom the sum paid away by Mr Smith to his prejudice, as if they had been themselves acting in Smith's place. It has been argued in defence of the trustees that the trust-deed contains a clause of immunity. In a question with creditors that clause is of no avail. Their ground of liability is, that they, having the only proper title to intromit with the effects of the deceased, have paid away a considerable part to wrong parties, and Mr Croom has thus suffered a wrong. Their liability is that of representatives and intromitters. Mr Croom has no concern with them in their proper trust character. Lord Mackenzie's interlocutor must therefore be, in substance, adhered to.

The other Judges concurred.

Agent for Mr Smith—Thomas White, S.S.C.

Agent for the other Trustees—J. & R. Macandrew, W.S.

Agent for Mr Croom—Lawrence M. Macara, W.S.

Friday, March 10.

MARIANSKI *v.* WISEMAN (M'LAY'S TRUSTEE).

Trust — Accession — Personal Bar — Diligence. A party to whom a trust for behoof of creditors had been intimated, and who expressed his approval thereof to the agent of the trustee, attended a sale of the truster's effects by the trustee, and took a share in its management—*held* to have acceded to the trust so as to be barred from attempting to acquire a preference by separate diligence.

By a trust-deed, dated 6th December 1869, the Rev. Walter M'Lay, formerly United Presbyterian minister at Strathaven, who was then insolvent, conveyed his whole estate to the defender for behoof of his creditors. The pursuer was a creditor of M'Lay for £499, in security of which he held an assignation of a policy of assurance on M'Lay's life for £500. On the 9th December the pursuer received a letter from M'Lay, intimating that he had granted the trust-deed, and that he expected the pursuer's concurrence. Next day he received a circular from the trustee's agent. He thereupon sent for the agent, and expressed his approval of the trust-deed. M'Lay's debts amounted to about £5000, and his whole estate consisted of his household furniture. All the other creditors acceded to the trust. After due advertisement the trustee proceeded to sell the furniture by public roup on the 16th and 17th December. The pursuer not only attended the sale, and made considerable purchases, but took a leading part in the management of the sale. The sum realised by the sale amounted to £429, 10s. 6d., which sum was arrested on the 1st January 1870 by the pursuer in the hands of the defender, as trustee on M'Lay's trust-estate, on the dependence of an action, in which he obtained decree for £499. He now brought an action of furthcoming.

The Lord Ordinary (MACKENZIE) found that in the circumstances above stated the pursuer was barred from attempting to acquire a preference by diligence over the other creditors; assoilzied the defender, reserving to the pursuer his right to be ranked with the other creditors. His Lordship added the following:—

"*Note.*—Prior to the use of the arrestment founded on, the trust had been constituted, the trustee had been in possession of the trust-estate, and he had fully realised the same. The pursuer also was fully aware of all this. Previous to the sale of the debtor's furniture and plenishing, which were, as the pursuer knew, the only assets, the pursuer had expressed to the agent of the trust-estate his approval of the trust; and in the knowledge that these effects were sold by the trustee for behoof of the whole creditors, he attended the sale, and made considerable purchases from the trustee of the trust effects, and otherwise acted as an acceding creditor. The Lord Ordinary considers that it is proved that the pursuer not only acquiesced in the trust, but also so acceded to it as to prevent him from attempting to gain a preference by diligence over the other creditors of the truster, all of whom have acceded. In the case of *Croll* v. *Robertson*, 7th February 1791, Dict. 12,404, as the report bears, "Accession to a trust was found sufficiently proved by the creditor having attended a roup of the bankrupt's effects, called by the trustees, bought several articles, and given his bill, payable to the trustees, for the price." That case, it is thought, rules the present.

"The pursuer contended that the trust-deed contained conditions upon the creditors with regard to the decision of the trustee and the effect of accession, to which no creditor who had not expressly acceded can be held bound. But as Mr Bell (Com. 2, 498) points out, there is a distinction between such accession as will bar a creditor from acquiring a preference by separate measures, and that accession which is necessary to bind him to the judgment of the trustee and the discharge